PHILLIP R. EMERSON, ESQ.
Nevada Bar No. 5940
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, Nevada 89014
Attorney for Defendant,
THE HERTZ CORPORATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KATHRYN A. NIEMEYER, Individually and as the Representative of the Estate Of ANTHONY NIEMEYER, MARK NIEMEYER, JESSICA NIEMEYER, and REBECCA NIEMEYER Plaintiff, vs. FORD MOTOR COMPANY, a Delaware THE HERTZ CORPORATION; a Delaware corporation; HERTZ RENT-A-CAR, a corporation, AUTOLIV ASP, INC., a Missouri Corporation; MORTON INTERNATIONAL, INC., DOES I through XX; ROES I through XX; MOES I through XX; and POES I Through XX, inclusive, Defendants.	CASE NO.: 2:09-cv-2091-JCM-PAL

OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANT THE HERTZ CORPORATION'S JOINDER TO DEFENDANT FORD MOTOR COMPANY'S DISCLOSURE OF EXPERT WITNESSES

Defendant, *THE HERTZ CORPORATION*, by and through its attorney of record, Phillip R. Emerson, Esq. of the Law Offices of Emerson and Manke, PLLC and hereby submits the following Opposition to Plaintiffs' Motion to Strike Defendant The Hertz

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ❧ TELEFAX: (702) 384-9447

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ✆ TELEFAX: (702) 384-9447

Corporation's Joinder to Defendant Ford Motor Company's Disclosure of Expert Witness. This Motion is based upon the following memorandum of points and authorities, any papers and pleadings on file herein, plus any oral argument of counsel entertained by the Court at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Plaintiff's Motion is premature.

Plaintiffs' Motion seeks to strike only *THE HERTZ CORPORATION'S* Joinder to Defendant FORD MOTOR COMPANY'S Disclosure of Expert Witnesses. It does not seek to strike the witnesses themselves, or FORD'S disclosure and designation. Thus, if this matter were to proceed to trial as it currently stands, FORD MOTOR COMPANY would be a Defendant. The experts would testify as designated, and the jury would hear each expert's respective testimony.

As such, as the case is currently constituted, this Motion is premature. If the case goes to trial with FORD as a Defendant, the jury will hear the expert testimony regardless of the designating party. There is only an issue if FORD settles and Plaintiffs proceed to trial against *THE HERTZ CORPORATION*. If the case goes to trial as currently constituted, there is no issue. As such, it is *THE HERTZ CORPORATION'S* position that Plaintiffs' Motion is premature, as FORD MOTOR COMPANY is still a party to this lawsuit.

B. *THE HERTZ CORPORATION* has made it clear throughout litigation it planned to rely on any and all designated witnesses and produced documents.

Defendant, *THE HERTZ CORPORATION*, served its initial Production of Documents on November 9, 2009. (See attached as Exhibit F to Plaintiffs' Motion) Included in this production is the following paragraph:

> **Defendants also incorporate all witnesses identified by all other parties in this action.** Defendants reserve the right to supplement this witness list as discovery proceeds, **to call any witness identified by any other party, and to call any witnesses for purposes of impeachment/rebuttal.** (See Ex. F to Plaintiffs' Motion, pp. 5-6) (emphasis added)

This paragraph is also included in a supplemental production of documents served by *THE HERTZ CORPORATION* on May 12, 2010. (See attached as Exhibit G to Plaintiffs' Motion)

On November 16, 2011, the parties filed a Joint Pre-Trial Order in accordance with Local Rule 16-3. (See Attached hereto as Exhibit A) Within the Joint Pre-Trial Order, each of the parties listed the witnesses it intends to call. Among those witnesses listed by *THE HERTZ CORPORATION* were every expert disclosed by FORD MOTOR COMPANY. In addition, *THE HERTZ CORPORATION* stated: "Hertz intends to offer live testimony of designated witnesses at trial." (See Ex. A, p. 9/lines 10-11) Plaintiffs' Counsel agreed to and signed this order. (See Ex. A, p. 19)

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ❖ TELEFAX: (702) 384-9447

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ✤ TELEFAX: (702) 384-9447

Thus, beginning on November 9, 2009 (the date *THE HERTZ CORPORATION* served its initial production of documents), Plaintiffs' counsel was on notice that *THE HERTZ CORPORATION* explicitly reserved its right to call on any witnesses designated or identified by other parties. Plaintiffs' counsel did not object to the initial production or to the supplemental production in May of 2010. Plaintiffs' counsel then signed the **stipulated to** Joint Pre-Trial Order on November 10, 2011. This pleading makes it clear that *THE HERTZ CORPORATION* intends to call and elicit testimony from designated witnesses at the time of trial.

C. *THE HERTZ CORPORATION* only learned that Plaintiffs' counsel objected to its calling of expert witnesses when the settlement conference with FORD failed to yield a settlement.

As Plaintiffs noted in their underlying Motion, Plaintiffs and FORD participated in a mediation that did not result in settlement with FORD.[1] It was only after this mediation occurred that Defendant learned Plaintiffs objected to *THE HERTZ CORPORATION* relying upon expert witnesses designated by Co-Defendant. Given that Plaintiffs' counsel did not object to the phrasing in both the initial and supplemental production of documents, *THE HERTZ CORPORATION* was surprised to learn of this

[1] Normally, Defendant would not discuss inadmissible settlement negotiations or mediation in a procedural motion, as they are irrelevant to the same. However, Plaintiffs "opened the door" to these discussions by referring to settlement negotiations in the underlying Motion, and as such, Defendant must defend itself accordingly.

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ❧ TELEFAX: (702) 384-9447

position. Upon learning of the same, *THE HERTZ CORPORATION* filed the Joinders to clear up any misconceptions.[2]

After mediation with FORD failed, Plaintiffs made a settlement demand to *THE HERTZ CORPORATION*. It is *THE HERTZ CORPORATION'S* position that Plaintiffs are attempting to settle with one Defendant prior to trial in order to "finance" what is sure to be a lengthy and costly trial. It appears as though Plaintiffs are now trying to use this alleged "issue" in an attempt to force *THE HERTZ CORPORATION* into settlement.

Given Plaintiffs' counsel's failure to object to the language contained in the productions of documents, coupled with counsel's signature on the Joint Pre-Trial Order, *THE HERTZ CORPORATION* never knew there was an issue regarding potential testimony from experts. Had counsel objected when the documents were served, this would have been resolved well before initial expert disclosures were due. Further, counsel had the opportunity to object to the language in the Joint Pre-Trial Order, but signed off on the same. As such, it is Defendant's position the instant Motion should be denied.

D. Should the matter proceed to trial, *THE HERTZ CORPORATION* will share equally in the costs of expert witnesses with FORD MOTOR COMPANY.

Prior to the filing of Plaintiffs' Motion, Defense counsel had discussions with FORD'S counsel regarding sharing of expert

[2] Given the language in the productions of documents, *THE HERTZ CORPORATION* is at a loss how there could ever be confusion.

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ✆ TELEFAX: (702) 384-9447

witness fees. If this matter proceeds to trial, *THE HERTZ CORPORATION* will share fees equally with FORD. If FORD were to settle, *THE HERTZ CORPORATION* will pay the expert fees entirely. Thus, any concern of Plaintiffs that these experts are not shared by *THE HERTZ CORPORATION* is unfounded.

E. Defendant is not required to either "designate" another party's experts or file a Joinder.

Plaintiffs argue repeatedly in their Motion that Defendant is not permitted to rely upon expert testimony from FORD MOTOR COMPANY'S expert witnesses because *THE HERTZ CORPORATION* did not specifically designate the experts. There is no argument the experts were not timely or properly disclosed, only that *THE HERTZ CORPORATION* failed to do so. However, such a designation is unnecessary. Indeed, *THE HERTZ CORPORATION* is not even required to file a Joinder, but did so to make it explicitly clear *THE HERTZ CORPORATION* intends to rely upon and call FORD'S expert witnesses at the time of trial. As such, if a "failure to disclose" did occur, it is most certainly harmless as described in FRCP 37(c)(1).

The Eighth Circuit declined to strike an expert when plaintiffs were provided with the name, resume, and opinions of an expert and made the same available for deposition. *Crump v. Versa Products,* 400 F.3d 1104, 2005 U.S. App. LEXIS 4510 (8th Cir. 2005) In the instant matter, all of these events occurred. Plaintiffs were aware of the names, resumes, opinions and reports

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ❧ TELEFAX: (702) 384-9447

of the experts prior to the initial expert disclosure deadline. The experts were made available for deposition. Plaintiffs cannot dispute these facts.

"A party is not required to disclose the expert witness of its adversary, though it will rely on the expert's testimony…" *US v. Schaudt*, 2009 US Dist. LEXIS 37212 (N.D. Ill. 2009) "A witness identified as a testimonial expert **is available to either side**…" *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009, emphasis added)

In *Bone Care Int'l, LLC v. Pentech Pharms.,* 2010 US Dist. LEXIS 1044549 (N.D. Ill. 2009), the Court followed the *SEC v. Koenig* decision and denied a Motion in Limine filed by Defendants seeking to prevent Plaintiffs from calling experts designated by Defendants.

It is clear from these decisions that *THE HERTZ CORPORATION* was not required to designate these witnesses. In fact, *THE HERTZ CORPORATION* was not required to file a Joinder to the designations, but did so out of an abundance of caution when it became clear Plaintiffs intended to object to *THE HERTZ CORPORATION* calling FORD'S experts at the time of trial. As a party is permitted to rely upon the expert testimony of another party, Plaintiffs' Motion is baseless and should be summarily denied.[3]

F. Plaintiffs are not prejudiced, as Defendant is not attempting to disclose any new information.

Plaintiffs point out in their Motion that Defendant will likely argue Plaintiffs have not been prejudiced. That is accurate in both respects; Plaintiffs have not been prejudiced and Defendant intends to argue the same. Plaintiffs had the names and opinions of all experts. The experts were made available for deposition, and in fact, were deposed. *THE HERTZ CORPORATION* does not seek to introduce any new experts or opinions at the time of trial. Rather, *THE HERTZ CORPORATION* seeks to rely upon properly designated and disclosed witnesses, and has expressed its intentions to do so since November 9, 2009 (the date of *THE HERTZ CORPORATION'S* initial production of documents). Moreover, caselaw makes it clear that *THE HERTZ CORPORATION* is not required to name these experts as expert witnesses. As such, Plaintiffs can demonstrate no prejudice, nor can they demonstrate any failure or procedural defect on the part of *THE HERTZ CORPORATION*.

CONCLUSION

THE HERTZ CORPORATION made it clear from the outset of litigation it intended to rely upon all witnesses designated by

[3] *THE HERTZ CORPORATION'S* language in the initial production of documents is bolstered by this caselaw, which clearly supports the premise that a party may rely upon the expert testimony of another party.

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 TELEFAX: (702) 384-9447

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 TELEFAX: (702) 384-9447

the parties. Plaintiffs made no objection at any time throughout litigation until mediation with FORD MOTOR COMPANY failed. *THE HERTZ CORPORATION* is not required to "designate" these experts as its own, as another party has done so and FRCP permits parties to rely upon witnesses designated by other parties to the same litigation. Finally, *THE HERTZ CORPORATION* does not seek to introduce any new evidence at the time of trial. As such, *THE HERTZ CORPORATION* respectfully requests this Honorable Court Deny Plaintiffs' Motion to Strike Defendant The Hertz Corporation's Joinder to Defendant Ford Motor Company's Disclosure of Expert Witness.

DATED this 13th day of December, 2011.

EMERSON & MANKE, PLLC

/s/ *Phillip R. Emerson*

PHILLIP R. EMERSON, ESQ.
Nevada Bar No. 5940
1055 Whitney Ranch Drive, Suite 120
Henderson, Nevada 89014
THE HERTZ CORPORATION

EMERSON & MANKE, PLLC
ATTORNEYS AT LAW
1055 WHITNEY RANCH DRIVE, SUITE 120
HENDERSON, NEVADA 89014
TELEPHONE: (702) 384-9444 ❖ TELEFAX: (702) 384-9447

CERTIFICATE OF MAILING AND FACSIMILE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that service of the foregoing, OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANT THE HERTZ CORPORATION'S JOINDER TO DEFENDANT FORD MOTOR COMPANY'S DISCLOSURE OF EXPERT WITNESSES, was made this 13th day of December, 2011 via facsimile and by depositing a true and correct copy of the same for mailing, addressed as follows:

Ralph J. Rohay, Esq.
RALPH J. ROHAY, ESQ.
309 West Lake Mead Parkway, Suite B
Henderson, Nevada 89015
(702) 737-3110 Facsimile
Attorney for Plaintiffs

Daniel T. Ryan, Esq.
BOLLWERK & RYAN, LLC
10525 Big Bend, Street
St. Louis, Missouri 63122
(314) 315-8113 Facsimile
Attorney for Plaintiffs

Daniel S. Roadman, Esq.
Jay J. Schuttert, Esq.
SNELL & WILMER, LLP
3883 Howard Hughes Parkway, Suite 110
Las Vegas, Nevada 89169
(702) 784-5252 Facsimile
Attorney for Defendant,
FORD MOTOR COMPANY

/s/ Kayla Kitchen
An Employee of EMERSON & MANKE, PLLC

EXHIBIT A

Daniel S. Rodman
Nevada Bar No. 8239
Jay J. Schuttert
Nevada Bar No. 8656
Joshua D. Cools
Nevada bar No. 11941
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
Email: drodman@swlaw.com
Email: jschuttert@swlaw.com
Email: jcools@swlaw.com

Attorneys for Defendant
FORD MOTOR COMPANY

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KATHRYN A. NIEMEYER, individually and as the Representative of the Estate of ANTHONY NIEMEYER, MARK NIEMEYER, JESSICA NIEMEYER, and REBECCA NIEMEYER,

Plaintiffs,

vs.

FORD MOTOR COMPANY, a Delaware corporation; THE HERTZ CORPORATION, a Delaware corporation; HERTZ RENT-A-CAR, a corporation; DOES I through XX; ROES I through XX; MOES I through XX; and POES I through XX, inclusive,

Defendants.

CASE NO. 2:09-cv-2091-JCM-PAL

JOINT PRE-TRIAL ORDER

Following pre-trial proceedings in this cause pursuant to Local Rule 16-3,

IT IS SO ORDERED:

I.

STATEMENT OF THE FACTS/CONTENTIONS OF THE PARTIES

This is a product liability action brought against Ford Motor Company and Hertz Corporation arising from a single vehicle collision that happened on September 18, 2007, in Las Vegas, Nevada. At the time of the collision, decedent Anthony Niemeyer, age 58, was driving a

2007 Ford Focus 4-door sedan that he had rented from Defendant Hertz Corporation and was travelling northbound on Village Center Drive in the Summerlin area of Las Vegas. He was alone and was wearing his seatbelt. The accident occurred at approximately 6:44 a.m.

Plaintiffs' Contentions: Plaintiffs' position is that the accident happened due to Mr. Niemeyer losing control of the Ford Focus for an unknown reason, possibly falling asleep or temporarily passing out. The Focus hit a tree at 15-16 mph. The "must-deploy" threshold for the driver's airbag is below the speed of impact. The driver's frontal airbag did not deploy as designed. The purpose of the airbag is to prevent injurious contact with the interior of the car. As a result of the non-deployment, Mr. Niemeyer struck his head on the steering wheel suffering a fatal head injury. Had the bag deployed as designed then Mr. Niemeyer would not have died.

Ford's Contentions: Ford's position is that the accident happened when Mr. Niemeyer suffered a lethal cardiac arrhythmia, causing him to slump over and to lose control of the subject 2007 Ford Focus. As a result, the Ford Focus drifted to the left, climbed and traveled over the raised center median, crossed the two oncoming lanes of traffic for southbound traffic, climbed a curb on the left side of the southbound lanes, and then struck a tree head-on at a speed of 13-14.5 mph. Because the impact speed of the Focus was below the "must-deploy" threshold for the driver's airbag, the airbag was not commanded to deploy upon impact with the tree.

Ford denies all of Plaintiffs' allegations against it, and asserts that the occupant restraint system in the Focus performed properly and as designed by deploying the driver's seatbelt pretensioner, while suppressing the driver's airbag, in this moderate severity collision. Moreover, Ford contends that the alleged defects in the 2007 Ford Focus' occupant restraint system did not cause or contribute to Anthony Niemeyer's death, inasmuch as he had sustained a lethal cardiac event prior to losing control of the vehicle.

Hertz's Contentions: Hertz's position is that the accident happened when Mr. Niemeyer suffered a lethal cardiac arrhythmia, causing him to slump over and to lose control of the subject 2007 Ford Focus. As a result, the Ford Focus drifted to the left, climbed and traveled over the raised center median, crossed the two oncoming lanes of traffic for southbound traffic, climbed a curb on the left side of the southbound lanes, and then struck a tree head-on at a speed of 13-14.5

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

mph. Because the impact speed of the Focus was below the "must-deploy" threshold for the driver's airbag, the airbag was not commanded to deploy upon impact with the tree.

Hertz denies all of Plaintiffs' allegations against it, and asserts that the occupant restraint system in the Focus performed properly and as designed by deploying the driver's seatbelt pretensioner, while suppressing the driver's airbag, in this moderate severity collision. Moreover, Hertz contends that the alleged defects in the 2007 Ford Focus' occupant restraint system did not cause or contribute to Anthony Niemeyer's death, inasmuch as he had sustained a lethal cardiac event prior to losing control of the vehicle.

II.

STATEMENT OF JURISDICTION

The collision that gives rise to this lawsuit occurred in Las Vegas, Nevada. Decedent Anthony Niemeyer was a resident of Missouri at the time of his death. Plaintiffs Kathryn Niemeyer, Mark Niemeyer, and Jessica Niemeyer are the heirs of Anthony Niemeyer and are residents of Missouri. Plaintiff Rebecca Niemeyer is also an heir of Anthony Niemeyer and is a resident of California. Ford Motor Company is a Delaware Corporation with its principle place of business in Michigan. Hertz Corporation is a Delaware Corporation with its principle place of business in New Jersey. This matter involves a claim for damages in excess of $75,000. Jurisdiction is therefore based upon diversity of citizenship under 28 U.S.C. § 1332. The parties admit that jurisdiction is proper, and admit that venue is proper pursuant to 28 U.S.C. § 1391.

III.

THE FOLLOWING FACTS ARE ADMITTED BY THE PARTIES AND REQUIRE NO PROOF

1. Venue is proper in the United States District Court for the District of Nevada in Las Vegas, Nevada.
2. The vehicle that is the subject of this lawsuit is a 2007 Ford Focus sedan.
3. Ford designed, manufactured, and marketed the subject 2007 Ford Focus.
4. Ford was, and is, in the business of designing, manufacturing and marketing automobiles for use by consumers.

5. This lawsuit arises out of a collision that occurred September 18, 2007, on Town Center Drive in Las Vegas, Nevada.

6. Anthony Niemeyer rented the subject 2007 Ford Focus from Defendant Hertz Corporation at its rental facility in Las Vegas.

7. The 2007 Ford Focus struck a tree.

8. The driver's frontal airbag did not deploy in the collision.

9. Anthony Niemeyer is survived by his wife, Kathryn and his three children, Mark, Jessica, and Rebecca.

IV.

THE FOLLOWING FACTS, ALTHOUGH NOT ADMITTED, WILL NOT BE CONTESTED AT TRIAL BY EVIDENCE TO THE CONTRARY

None at this time.

V.

THE FOLLOWING ARE THE PARTIES' STATEMENT OF OTHER ISSUES OF FACT TO BE DETERMINED UPON TRIAL

A. Plaintiffs:

1. The sequence of events during the collision, including the speed of the Focus at the time of its impact with the tree;
2. Whether the Focus's occupant restraint system is defective for failing to perform as designed;
3. Whether Anthony Niemeyer's death was caused by the Focus's occupant restraint system failing to perform as designed;
4. Why the airbag did not deploy;
5. Whether Ford adequately tested the Ford Focus;
6. Whether Ford knew or should have known that the occupant restraint system was not performing as designed in its testing;
7. The cause of Anthony Niemeyer's death;
8. The extent of Plaintiffs' injuries and damages; and

Snell & Wilmer L.L.P. LAW OFFICES 3800 HOWARD HUGHES PARKWAY, SUITE 1000 LAS VEGAS, NEVADA 89169 (702)784-5200

9. The amount of compensatory damages, if any, to be awarded.

B. Ford:

1. The sequence of events during the collision, including the speed of the Focus at the time of its impact with the tree;
2. Whether the Focus's occupant restraint system is defective in any way;
3. Whether Anthony Niemeyer's death was caused by the Focus's allegedly defective occupant restraint system;
4. Whether the Focus, and the methods and techniques of its testing and design, conformed to the state of the art at the time the subject Focus was first sold to Hertz;
5. Whether the Focus met or exceeded all applicable Federal Motor Vehicle Safety Standards when it was manufactured and sold;
6. The cause of Anthony Niemeyer's death;
7. The extent of Plaintiffs' injuries and damages; and
8. The amount of compensatory damages, if any, to be awarded.

C. Hertz

1. The sequence of events during the collision, including the speed of the Focus at the time of its impact with the tree;
2. Whether the Focus's occupant restraint system is defective in any way;
3. Whether Anthony Niemeyer's death was caused by the Focus's allegedly defective occupant restraint system;
4. Whether the Focus, and the methods and techniques of its testing and design, conformed to the state of the art at the time the subject Focus was first sold to Hertz;
5. Whether the Focus met or exceeded all applicable Federal Motor Vehicle Safety Standards when it was manufactured and sold;
6. The cause of Anthony Niemeyer's death;
7. The extent of Plaintiffs' injuries and damages;

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

8. The amount of compensatory damages, if any, to be awarded; and,

9. The respective liability of the parties.

VI.

THE FOLLOWING ARE THE CONTESTED ISSUES OF LAW TO BE DETERMINED UPON TRIAL

A. **Plaintiffs:**

1. The issues of law raised by the parties' anticipated motions *in limine*.

B. **Ford:**

1. The appropriate sanctions for Plaintiffs' spoliation of evidence.
2. The issues raised in the parties' anticipated motions *in limine*.
3. The issues of law raised by Plaintiffs at trial.

C. **Hertz:**

1. The issues raised in the parties' anticipated motions *in limine*.
2. The issues of law raised by Plaintiffs at trial.
3. The appropriate sanctions for Plaintiffs' spoliation of evidence.

VII.

EXHIBITS

The following exhibits, although not agreed to as admissible in evidence of this case are subject to be used by the parties. The parties will work to generate a list of agreed exhibits:

(1) Plaintiffs' exhibits:

Due to the large number of exhibits that Plaintiffs anticipate using at trial, Plaintiffs have attached their exhibit list as Exhibit "A."

(2) Ford's exhibits:

Due to the large number of exhibits that Ford anticipates using at trial, Ford has attached its exhibit list as Exhibit "B."

(3) Hertz's exhibits:

A. Defendant's Answer, attached hereto and bate stamped as numbers D0001 through D0005;

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

B. Legal Hold Memo from Hertz Claim Management, attached hereto and bate stamped as number D0006;

C. State of Nevada Traffic Accident Report, dated September 18, 2007, attached hereto and bate stamped as numbers D0007 through D0012;

D. Black and white photograph of 2007 Ford Focus, attached hereto and bate stamped as number D0013;

E. Repair estimate for 2007 Ford Focus, attached hereto and bate stamped as numbers D0014 through D0019;

F. Hertz vehicle accident report, attached hereto and bate stamped as number D0020;

G. Correspondence to Norm LaFave authorizing an inspection of the 2007 Ford Focus, attached hereto and bate stamped as number D0021;

H. Black and white photographs of 2007 Ford Focus, attached hereto and bate stamped as numbers D0022 through D0028;

I. Information regarding Anthony Niemeyer's rental of 2007 Ford Focus from Hertz, attached hereto and bate stamped as number D0029;

J. Documents relating to the salvage of the 2007 Ford Focus, attached hereto and bate stamped as numbers D0030 through D0037;

K. Documents relating to the towing of the vehicle from the accident scene, attached hereto and bate stamped as numbers D0038 through D0039;

L. Miscellaneous correspondence from Plaintiff, Kathryn Niemeyer, attached hereto and bate stamped as numbers D0040 through D0050;

M. Photos of 2007 Ford Focus, attached hereto and bate stamped as numbers D0051 through D0095.

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Hertz also incorporates all documents and tangible items identified by all other parties. Defendant reserves the right to supplement this List of Exhibits as discovery proceeds.

As to the following exhibits, the parties have reached stipulations regarding the same:

The parties will work together to generate a list of agreed exhibits.

The following documents may be marked as exhibits, but shall not be admissible in evidence at this time:

The parties will work together to generate a list of agreed exhibits.

As to the following exhibits, the party against whom the same will be offered objects to their admission upon the grounds stated:

The parties reserve the right to object to exhibits. The parties have agreed to reserve any such objections until the time of trial. As noted above, the parties will work together to generate a list of agreed exhibits.

Further, with the exception of exhibits to be used solely for impeachment, the parties agree that each evening by 8:00 p.m. they will exchange the exhibits that they plan to use the following day so that any exhibit disputes/objections can be addressed by the Court each morning before trial resumes. In addition, the parties will identify each witness that they intend to call at trial not less than 48 hours prior to calling each witness to testify.

(1) Objections as to Plaintiffs' exhibits:

The parties have agreed to reserve any such objections until the time of trial. As noted above, the parties will work together to generate a list of agreed exhibits.

(2) Objections as to Ford's exhibits:

The parties have agreed to reserve any such objections until the time of trial. As noted above, the parties will work together to generate a list of agreed exhibits.

(3) Objections as to Hertz's exhibits

The parties have agreed to reserve any such objections until the time of trial. As noted above, the parties will work together to generate a list of agreed exhibits.

/ / /

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Depositions:

Plaintiffs: Plaintiffs intend to offer live testimony of designated witnesses at trial. In the event that Plaintiffs are unable to call a witness and must offer deposition testimony in lieu of live testimony, Plaintiffs reserve the right to supplement this Pre-Trial Order to designate deposition testimony to be used at trial.

Ford: Ford intends to offer live testimony of designated witnesses at trial. In the event that Ford is unable to call a witness and must offer deposition testimony in lieu of live testimony, Ford reserves the right to supplement this Pre-Trial Order to designate deposition testimony to be used at trial.

Hertz: Hertz intends to offer live testimony of designated witnesses at trial. In the event that Ford is unable to call a witness and must offer deposition testimony in lieu of live testimony, Ford reserves the right to supplement this Pre-Trial Order to designate deposition testimony to be used at trial.

Deposition Designations: The parties agree to provide page and line designations of witnesses' depositions that will be played or read in at trial no later than 30 days prior to the trial date. Objections and counter-designations will be due 7 days following the initial designations.

VIII.

The following witnesses may be called upon by the parties at trial:

(a) Plaintiffs' witnesses:

Kathyrn Niemeyer
8812 Julia Dent Drive
St. Louis, Missouri 63123

Mark Niemeyer
5917 Donalds Court
St. Louis, Missouri 63126

Jessica Niemeyer
8812 Julia Dent Drive
St. Louis, Missouri 63123

///

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Rebecca Niemeyer
8812 Julia Dent Drive
St. Louis, Missouri 63123

Mariusz Ziejewski, Ph.D.
2363 20th Avenue South
Fargo, North Dakota 58103

Robert Caldwell
Ponderosa Associates
130 Miners Drive
Lafayette, Colorado 80026

Ram Krishnaswami
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, Michigan 48126

Michael Nranian
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, Michigan 48126

David Bauch
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, Michigan 48126

Richard Ruth
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, Michigan 48126

Howard Slater
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, Michigan 48126

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Christopher Caruso
1536 Sagrada Court
Henderson, Nevada 89074

Mary Case, M.D.
Saint Louis University School of Medicine
Department of Pathology
1402 South Grand Boulevard
St. Louis, Missouri 63104

Karen Grossman Tabak, Ph.D., CPA
12608 Royal Manor Drive
St. Louis, Missouri 63141

Officer Richard Tusko
c/o Las Vegas Metropolitan Police Department
400 S. Stewart Street
Seventh Floor
Las Vegas, Nevada 89101

Officer Karl Tomaso
c/o Las Vegas Metropolitan Police Department – Traffic Division
2300 E. Saint Louis Avenue
Las Vegas, Nevada 89104

P. Michael Murphy
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, Nevada 89106

Nancy Dahl
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, Nevada 89106

Dr. Alane Olson
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, Nevada 89106

Monty Alexander
9037 Cotton Rose Way
Las Vegas, Nevada 89134

Jacqueline Bolen
5227 Southern Cypress Court
North Las Vegas, Nevada 89031

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Dr. Frank Pape
c/o Summerlin Hospital
657 Town Center Drive
Las Vegas, Nevada 89144

Monika Washington
3800 South Decatur # 10
Las Vegas, Nevada 89103

Alberto Torres
3646 Forest Glen Road
San Diego, California 92101

Karen Geigas
3913 Gold Point Street
Las Vegas, Nevada 89129

Dr. Shahabuddin Kahn
7455 W. Washington Ave., Suite 300,
Las Vegas, Nevada 89128

Kirk Casperson
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, Nevada 89101

Dustin Signor
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, Nevada 8910

Travis Story
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, Nevada 89101

Norm Lafave
c/o Phil Emerson
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, Nevada 89014

Gregory Marrone
9901 Trailwood Drive
Las Vegas, NV 89134

///

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

James Long
c/o Davis Funeral Home
6200 S. Eastern
Las Vegas, NV 8119

(b) **Ford's witnesses:**

Officer Richard Tusko
c/o Las Vegas Metropolitan Police Department
400 S. Stewart Street
Seventh Floor
Las Vegas, NV 89101

Officer Karl Tomaso
c/o Las Vegas Metropolitan Police Department – Traffic Division
2300 E. Saint Louis Avenue
Las Vegas, NV 89104

P. Michael Murphy
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Nancy Dahl
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Dr. Alane Olson
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Monty Alexander
9037 Cotton Rose Way
Las Vegas, NV 89134

Jacqueline Bolen
5227 Southern Cypress Court
North Las Vegas, NV 89031

Dr. Frank Pape
c/o Summerlin Hospital
657 Town Center Drive
Las Vegas, NV 89144

Monika Washington
3800 South Decatur # 10
Las Vegas, NV 89103

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Alberto Torres
3646 Forest Glen Road
San Diego, CA 92101

Karen Geigas
3913 Gold Point Street
Las Vegas, NV 89129

Dr. Shahabuddin Kahn
7455 W. Washington Ave., Suite 300,
Las Vegas, NV 89128

Kirk Casperson
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Dustin Signor
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Travis Story
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Norm Lafave
c/o Phil Emerson
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014

Phil Ode
c/o Robert Bosch, LLC
38000 Hills Tech Drive
Farmington Hills, MI 48331

Paul Mendez
c/o Phil Emerson
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014

Brian Jones
American Bio Engineers
3606 N. Rancho Drive, Suite 140
Las Vegas, NV 89130

Gregory Marrone
9901 Trailwood Drive
Las Vegas, NV 89134

///

///

Snell & Wilmer L.L.P. LAW OFFICES 3800 HOWARD HUGHES PARKWAY, SUITE 1000 LAS VEGAS, NEVADA 89169 (702)784-5200

James Long
c/o Davis Funeral Home
6200 S. Eastern
Las Vegas, NV 8119

Cleve Bare
Exponent
23445 North 19th Avenue
Phoenix, AZ 85027

Gerry Corwin
Carr Engineering
12500 Castlebridge Drive
Houston, TX 77065

Elizabeth Raphael, M.D.
Delta V Biomechanics, Inc.
930 Commercial Street
Palo Alto, CA 94303

Gregory A. Miller, P.E.
Collision Protection Sciences, LLC
315 Water Street
Rochester, MI 48307

Thomas L. Bennett, M.D.
Forensic Medicine and Pathology, PLLC
4549 Palisades Park Drive
Billings, MT 59106

Mr. Ram Krishnaswami
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, MI 48126

David Weiner, MBA
Vavoulis, Weiner & McNulty, LLC
445 South Figueroa Street, Suite 3700
Los Angeles, CA 90071-1641

Ford reserves the right to call any and all custodian of records for any records in question, who may testify as to the authenticity of any and all such records. Ford also reserves the right to call any witness listed by any other party.

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

(c) **Hertz's witnesses:**

Officer Richard Tusko
c/o Las Vegas Metropolitan Police Department
400 S. Stewart Street
Seventh Floor
Las Vegas, NV 89101

Officer Karl Tomaso
c/o Las Vegas Metropolitan Police Department – Traffic Division
2300 E. Saint Louis Avenue
Las Vegas, NV 89104

P. Michael Murphy
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Nancy Dahl
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Dr. Alane Olson
c/o Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, NV 89106

Monty Alexander
9037 Cotton Rose Way
Las Vegas, NV 89134

Jacqueline Bolen
5227 Southern Cypress Court
North Las Vegas, NV 89031

Dr. Frank Pape
c/o Summerlin Hospital
657 Town Center Drive
Las Vegas, NV 89144

Monika Washington
3800 South Decatur # 10
Las Vegas, NV 89103

Alberto Torres
3646 Forest Glen Road
San Diego, CA 92101

Karen Geigas
3913 Gold Point Street
Las Vegas, NV 89129

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Dr. Shahabuddin Kahn
7455 W. Washington Ave., Suite 300,
Las Vegas, NV 89128

Kirk Casperson
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Dustin Signor
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Travis Story
c/o Las Vegas Fire & Rescue
500 N. Casino Center Blvd.
Las Vegas, NV 89101

Norm Lafave
c/o Phil Emerson
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014

Phil Ode
c/o Robert Bosch, LLC
38000 Hills Tech Drive
Farmington Hills, MI 48331

Paul Mendez
c/o Phil Emerson
EMERSON & MANKE, PLLC
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014

Brian Jones
American Bio Engineers
3606 N. Rancho Drive, Suite 140
Las Vegas, NV 89130

Gregory Marrone
9901 Trailwood Drive
Las Vegas, NV 89134

James Long
c/o Davis Funeral Home
6200 S. Eastern
Las Vegas, NV 8119

Cleve Bare
Exponent
23445 North 19th Avenue
Phoenix, AZ 85027

Snell & Wilmer L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

Gerry Corwin
Carr Engineering
12500 Castlebridge Drive
Houston, TX 77065

Elizabeth Raphael, M.D.
Delta V Biomechanics, Inc.
930 Commercial Street
Palo Alto, CA 94303

Gregory A. Miller, P.E.
Collision Protection Sciences, LLC
315 Water Street
Rochester, MI 48307

Thomas L. Bennett, M.D.
Forensic Medicine and Pathology, PLLC
4549 Palisades Park Drive
Billings, MT 59106

Mr. Ram Krishnaswami
c/o Office of the General Counsel
Ford Motor Company
World Headquarters
One American Road
Dearborn, MI 48126

David Weiner, MBA
Vavoulis, Weiner & McNulty, LLC
445 South Figueroa Street, Suite 3700

Los Angeles, CA 90071-1641

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

IX.

A trial date in this matter has not yet been set. Due to trial conflicts of counsel, the parties request that the trial date be set for the first available trial stack after May 1, 2012.

///

///

///

///

///

///

///

X.

It is estimated that the trial herein will take a total of 10-12 days.

DATED this 10th day of November, 2011.

SNELL & WILMER L.L.P.

By: [signature]
Daniel S. Rodman, Esq.
Jay J. Schuttert, Esq.
Joshua D. Cools, Esq.
3883 Howard Hughes Pkwy., Ste. 1100
Las Vegas, NV 89169

Attorneys for Defendant
FORD MOTOR COMPANY

DATED this 10th day of November, 2011.

EMERSON & MANKE, PLLC

By: /s/ Phillip R. Emerson
Phillip R. Emerson, Esq.
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014

Attorneys for Defendant
THE HERTZ CORPORATION

DATED this 10th day of November, 2011.

KUHLMAN LAW FIRM, LLC

By: /s/ Bradley Kuhlman
Bradley Kuhlman, Esq. (*Pro Hac Vice*)
Chad C. Lucas, Esq. (*Pro Hac Vice*)
1100 Main St., Suite 2550
Kansas City, MO 64105

Daniel T. Ryan, Esq. (*Pro Hac Vice*)
BOLLWERK & RYAN LLC
10525 Big Bend Boulevard
St Louis, MO 63122

Ralph J. Rohay, Esq.
309 W. Lake Mead Pkwy., Ste. B
Las Vegas, NV 89015

Attorneys for Plaintiffs

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200

XI.

ACTION BY THE COURT

1. Pursuant to this Court's ________________ Minute Order, this case is set down for JURY TRIAL on _ **5-7-2012 at 9:00 a.m.** Calendar call shall be at _ **5-2-2012 at 1:30 p.m.**

2. Trial briefs shall be filed in original and two copies on or before _ **5-2-2012** ___, **at 1:30 p.m.** original shall be filed in the case file and the copy submitted to the Court. Briefs submitted without the extra copy shall be returned by the Clerk for compliance with this paragraph.

3. JURY TRIAL:

(1) An original and two (2) copies of all instructions requested by either party shall be submitted to the clerk for filing on or before _ **5-2-2012 at calendar call** .

(2) An original and two (2) copies of all suggested questions of the parties to be asked of the jury panel by the court on voir dire shall be submitted to the clerk for filing on or before _ **5-2-2012 at calendar call** ___.

4. Counsel shall serve a copy of any trial brief, jury instructions, and verdict forms upon opposing counsel contemporaneously with the filing thereof with the Court.

5. The foregoing Pretrial Order has been approved by the parties to this action as evidenced by the signatures of their counsel hereon, and the order is hereby entered and will govern the jury trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED: November 16, 2011.

James C. Mahan

UNITED STATES DISTRICT JUDGE

Snell & Wilmer
L.L.P.
LAW OFFICES
3800 HOWARD HUGHES PARKWAY, SUITE 1000
LAS VEGAS, NEVADA 89169
(702)784-5200